LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 23 1954
HAROLD B. WILLEY, Clerk

No. [redacted] 45

In the Supreme Court of the United States

OCTOBER TERM, 1953

FEDERAL POWER COMMISSION, PETITIONER

v.

COLORADO INTERSTATE GAS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	4
Reasons for granting the writ	9
Conclusion	29

CITATIONS

Cases:

Aircraft & Diesel Corp. v. *Hirsch*, 331 U.S. 752	16
Colorado Interstate Gas Company v. *Federal Power Commission*, 324 U.S. 581	12
Democrat Printing Co. v. *Federal Communications Commission*, 202 F. 2d 298	18
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134	13
Federal Power Commission v. *Arkansas Power & Light Co.*, 330 U.S. 802	17
Federal Power Commission v. *Hope Natural Gas Company*, 320 U.S. 591	19
Federal Power Commission v. *Hope Natural Gas Com-* 17	19
Macauley v. *Waterman Steamship Corp.*, 327 U.S. 540	16
Marshall Field & Co. v. *National Labor Relations Board*, 318 U.S. 253	11, 15, 16
May Stores Co. v. *National Labor Relations Board*, 326 U.S. 376	11, 15
National Labor Relations Board v. *Cheney Lumber Co.*, 327 U.S. 385	13, 14
National Labor Relations Board v. *Pinkerton's National Detective Agency*, 202 F. 2d 230	18
National Labor Relations Board v. *Pugh & Barr, Inc.*, 194 F. 2d 217	18
National Labor Relations Board v. *Townsend*, 185 F. 2d 378, certiorari denied, 341 U.S. 909	18
Panhandle Eastern Pipe Line Co. v. *Federal Power Commission*, 324 U.S. 635	12, 14, 15, 16
Switchmen's Union v. *National Mediation Board*, 320 U.S. 297	18
Ries & Co. v. *United States*, 341 U.S. 907	13
Todd v. *Securities & Exchange Commission*, 137 F. 2d 475	16
Unemployment Commission v. *Aragon*, 329 U.S. 143	13, 15
United States v. *Hancock Truck Lines*, 321 U.S. 774	13, 15, 19

Cases—Continued

	Page
United States v. *Northern Pacific R. Co.*, 288 U.S. 490	15
United States v. *Tucker Truck Lines*, 344 U.S. 33	9, 15, 17, 18
United States ex rel. Vajtauer v. *Commissioner*, 273 U.S. 103	15
Wong Yang Sung v. *McGrath*, 339 U.S. 33	18

Statutes:

Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*):	
Section 10	3-4, 17
Section 10(e)	4, 17
Section 11	16
Civil Aeronautics Act, Section 1006(e), 49 U.S.C. 646(e)	9
Fair Labor Standards Act, Section 10(a), 29 U.S.C. 210(a)	9
Federal Power Act, Section 313(b), 16 U.S.C. 825l(b)	9
National Labor Relations Act, Section 10(e), 29 U.S.C. 160(e)	9
Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717, *et seq.*:	
Section 7	5
Section 19	2
Section 19(a)	3, 11
Section 19(b)	2, 3, 5, 9, 13-14, 16
Public Utility Holding Company, Section 24, 15 U.S.C. 79x	9
Securities Act of 1933, Section 9(a) 15 U.S.C. 77i(a)	9
Securities Exchange Act of 1934, Section 25(a) 15 U.S.C. 78y(a)	9
Trust Indenture Act, Section 322, 15 U.S.C. 77vvv	9

Miscellaneous:

S. Doc. No. 248, 79th Cong. 2d Sess. p. 36	17

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 710

FEDERAL POWER COMMISSION, PETITIONER

v.

COLORADO INTERSTATE GAS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause on January 25, 1954, invalidating the condition pursuant to which the Federal Power Commission had excluded from cost of service certain losses from gasoline operations.

OPINIONS BELOW

The original opinion of the Court of Appeals (R. 593-610) is reported at 209 F. 2d 717; its opinion on rehearing (R. 630-633) is reported at 209 F. 2d 732. The opinion and order of the Federal Power Commission directing the rate reduction (R. 77-140) are reported at 95 PUR (NS) 97.[1]

[1] Also pertinent here are the Commission's opinion and order approving the merger of the properties and facilities of Colorado Interstate Gas Company with those of Canadian River Gas Company (R. 549-568). These are reported at 10 FPC 105, 778.

JURISDICTION

The original judgment of the Court of Appeals was entered on October 29, 1953 (R. 610). Pursuant to the Federal Power Commission's timely petition for rehearing, the Court of Appeals on December 8, 1953 vacated its original judgment and granted rehearing (R. 621). The judgment on rehearing was entered on January 25, 1954 (R. 633). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), and Section 19(b) of the Natural Gas Act (15 U.S.C. 717r (b)).

QUESTION PRESENTED

Whether in a statutory review proceeding of a rate order of the Federal Power Commission, a court has jurisdiction, by reason of asserted inherent power and Section 10(e) of the Administrative Procedure Act, to consider and correct *sua sponte* an alleged error, not raised by the company in the administrative proceeding, in its application for rehearing filed with the Commission, nor in its petition for review, notwithstanding the provision of Section 19(b) of the Natural Gas Act that

> * * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *

STATUTES INVOLVED

1. Section 19 of the Natural Gas Act (52 Stat. 821, 831, 15 U.S.C. 717r) provides in pertinent part:

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. * * * No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *

2. Section 10 of the Administrative Procedure Act (60 Stat. 237, 243, 5 U.S.C. 1009) provides in pertinent part:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT

The Federal Power Commission on July 31, 1952, adopted its order directing Colorado Interstate Gas

Company, a "natural-gas company" under the Natural Gas Act, to reduce its rates for sales for resale in interstate commerce by about $2,703,000 a year (R. 77-140). Following the Commission's denial of Colorado's application for rehearing (R. 141-188, 188-204), Colorado filed, as authorized by Section 19(b) of the Natural Gas Act, *supra*, p. 3, a petition for review in the Court of Appeals for the Tenth Circuit, which affirmed the Commission's order in all respects except one (R. 1-9, 593-610). The court in its original opinion held that the Commission had erred in excluding from cost of service a loss of about $420,000 suffered by Colorado on its gasoline operations and remanded the cause to the Commission for further proceedings with respect thereto (R. 601-602). The facts relevant to this issue may be summarized as follows.

Early in 1950, Colorado, jointly with Canadian River Gas Company, requested the Commission to authorize Colorado to acquire and operate all of Canadian's properties pursuant to Section 7 of the Natural Gas Act (R. 564). During the pendency of this application, the question arose as to whether the consumers ultimately receiving gas from Colorado might have to bear an additional expense if at some future time, the expense of certain gasoline plant operations exceeded the proceeds received by Colorado under the merger plan. "To remove this question," Colorado proposed that "in order to keep a rate payer from meeting this deficiency the Commission could condition [its authorization] so as in effect to provide that such deficit would not be considered in determining reasonable rates. In

other words, the stockholders of Colorado * * * would take the risk as to whether or not gasoline prices will go down." (R. 620). Implementing this proposal, Colorado submitted a draft of condition for incorporation into the Commission's order, which, according to Colorado, "would adequately protect ultimate consumers" (R. 620-621). Thereafter, the Commission authorized the merger on the condition, substantially as suggested by Colorado, that (R. 566-567):

> * * * if, as a result of carrying out the terms and conditions in the transaction proposed as a part of the acquisition and merger of Canadian into Colorado whereby rights to liquid hydrocarbons in place are granted to Southwestern Development Company and whereby Colorado is to receive 50% of the gross proceeds from the sale of certain liquid hydrocarbons and 15% of the net revenues to be received by Colorado from the hydrocarbons resulting from the operation of Fritch Natural Gasoline Plant of Texoma Natural Gas Company, the costs properly allocable to such hydrocarbons exceed the amounts payable to Colorado pursuant to such transaction, then and in that case in any proceeding in which the effective or proposed rates of Colorado are under inquiry such excess shall not be considered as a cost of service to Colorado's natural gas customers and consumers.

No review was sought of the Commission's authorization or the condition.

Subsequently, in the rate investigation, the Com-

mission determined that the costs properly allocable to the gasoline operations exceeded the gasoline revenues to Colorado by about $420,000 and, in accordance with the condition excluded this amount from Colorado's cost of service (R. 115). At no time during the rate proceedings did Colorado question the validity of the condition. Although in its application for rehearing Colorado specified about 20 errors in regard to the method used by the Commission in determining the amount of excess costs (R. 148-153, 169-174), it did not question the propriety of excluding the excess costs if properly determined, but on the contrary it assumed that Colorado was required to absorb such costs (R. 171).[2]

In its original opinion the court of appeals rejected Colorado's attack on various aspects of the order, including the Commission's method of determining the excess costs (R. 600-601). However, the court, assuming the question to be before it, went on to rule that the elimination of the excess costs as provided by the condition deprived Colorado of the fair rate of return to which it is entitled and, accordingly, remanded the case to the Commission (R. 601-602, 610).[3]

---

[2] As summarized in its petition for review, Colorado urged only that the Commission's method of determining the excess costs was "contrary to the condition imposed upon Petitioner in * * * [the] previous order * * * [and] to all the evidence of record * * *." It admitted that under the terms of the condition Colorado "is to bear" the loss if "'properly' allocable to such operations" (R. 61). See also R. 171-172.

[3] The court's decision requiring that this amount be included in the cost of service, has the additional effect—since the revenues would thereby be increased—of increasing the income tax component of the cost of service. This would

The Commission's petition for rehearing (R. 610-619) pointed out that Colorado had not attacked the validity of the condition in its application for rehearing—or indeed at any other time before the Commission or the court of appeals—and consequently that Section 19(b) of the Act, *supra*, p. 3, precluded consideration thereof by the court. The court granted the rehearing (R. 621), but after further briefing and argument, rejected the Commission's contention (R. 630-633). It held that "it is not correct, as stated by the Commission, to say that Colorado did not object to the exclusion of this item. It did object thereto both in the original proceeding and in its petition for rehearing. It is true, however, that it did not place its objection on the legal ground upon which we predicated our conclusions" (R. 631). In addition, the court ruled that, in any event, it has inherent power in reviewing the Commission's order to consider and correct *sua sponte* manifest and substantial errors; according to the court, Section 19(b) does not deprive it "of its right to consider all relevant matters necessary to determine a just end result" but rather merely means that "one complaining of the order of the Commission will not be heard and has no standing to urge an objection not first submitted to the Commission" (R. 631-632). The court concluded by reading Section 10(e) of the Administrative Procedure Act, *supra*, p. 4, as containing a clear and positive mandate requiring the court *sua*

---

result in an over-all increase in the cost of service of $891,902 and so would reduce the rate reduction from about $2,700,000 to about $1,800,000.

sponte to note basic erroneous legal conclusions (R. 632-633).

REASONS FOR GRANTING THE WRIT

The question presented by this case—whether, in the face of a statutory provision which in terms forbids such action, courts may set aside administrative decisions on grounds not presented to the administrative agency—extends beyond the Natural Gas Act and is one of general importance in the delicate area of judicial review of administrative action. A number of statutes providing for review of administrative action—and defining the scope of such review—contain provisions which, like Section 19(b), prohibit judicial consideration of alleged errors by the regulatory body when not raised during the administrative proceeding. See, *e.g.*, Section 313(b) of the Federal Power Act, 16 U.S.C. 825l (b); Section 9(a) of the Securities Act of 1933, 15 U.S.C. 77i(a); Section 322 of the Trust Indenture Act, 15 U.S.C. 77vvv; Section 25(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78y(a); Section 24 of the Public Utility Holding Company Act, 15 U.S.C. 79x; Section 10(a) of the Fair Labor Standards Act, 29 U.S.C. 210(a); Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e); Section 1006(e) of the Civil Aeronautics Act, 49 U.S.C. 646(e).[4] Moreover, *United*

[4] While the Natural Gas Act (and the Federal Power Act) preclude judicial consideration of alleged errors not raised by application for rehearing before the Commission, all the other statutes cited in the text require the raising of the alleged error during the administrative proceeding as a condition precedent to its being raised before the reviewing court.

States v. *Tucker Truck Lines*, 344 U.S. 33, suggests that this same rule applies in the absence of such a statutory provision.

1. Even a casual reading of Colorado's assignments of error in its application for rehearing before the Commission (R. 148-153, 169-174) leaves no room for doubt that Colorado was not questioning the validity of the merger condition which the court below struck down. In this application for rehearing, Colorado plainly objected solely to the Commission's method of determining the existence of a loss; Colorado asserted only that the method it proposed rather than that adopted by the Commission, was the proper one, and that under its proposed method, there was no loss to be excluded (*ibid.*) Colorado, thus, raised no question as to the validity of the merger condition itself and indeed, in effect, conceded that the loss, if properly determined, should be excluded from cost of service as required by the condition. Consequently, when the court sustained the Commission's method of determining the loss (R. 600-601), it disposed of the only objection raised by Colorado.

Colorado itself never understood that it questioned—or even that it was in a position to question—the validity of the merger condition. In addition to the fact that it had itself proposed the condition in the merger proceeding in order to obviate an ob-

---

Here, Colorado did not question the condition at any time during the rate investigation. See *supra*, p. 7; *infra*, pp. 10-11.

jection to the merger proposed by it (see *supra*, pp. 5-6). Colorado's petition for review filed in the court below in effect admitted that the validity of the condition was not in issue. And in its response to the Commission's petition for rehearing filed in the court below, Colorado conceded (R. 638):

> * * * While Petitioner [Colorado] did not argue the very ground pointed out by the Court for reversal, nevertheless, there was before the Court a record for review of the rate proceeding, and in it was the issue of deducting the Commission found loss on gasoline operations. It can be well understood why Petitioner did not urge as a ground of reversal the ground adopted by the Court. Petitioner having acquiesced in the condition which the Court has struck down could hardly immediately turn its back upon such acquiescence. * * *

While the court below recognized that Colorado had not attacked the validity of the condition as such, it appears to have regarded as sufficient Colorado's objection to the method used by the Commission in determining the loss (R. 631). But it is established that requirements such as that of Section 19(b) may be satisfied only by an "objection * * * sufficiently specific to apprise the [Commission] of the question now presented" (*May Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386, fn. 5; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255), a requirement expressly incorporated in Section 19(a)

of the Gas Act, *supra*, p. 3. Here, there plainly was no such apprisal. Colorado did not object to the exclusion of the loss generally, but rather directed its twenty assignments relative thereto specifically to various aspects of the Commission's method of determining whether there was a loss to be excluded under the condition. These assignments certainly failed to apprise the Commission that the condition itself was under attack. This is especially clear when the assignments are viewed against the condition's prior history, *i.e.*, that the condition had originated in another proceeding at Colorado's behest and that at no time during the rate proceeding had Colorado questioned the condition.

Nor is any different result required because, as the court below asserted "the important and deciding factor in rate hearings is the end result" and "a reviewing court is more concerned with the end result than with the multiple detailed mechanics employed in reaching it." (R. 602). The "end result" of a rate order is not open to court review unless challenged and then only to the extent of such challenge. *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U.S. 581, 605-606; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649. Here, the "end result" was not challenged because of the exclusion of the loss. Moreover, the "end result" test does not nullify the requirement of specific assignments of error; all it means is that the validity or invalidity of required specific assignments of error are to be examined and passed on in the light

of the impact of the alleged error on the "end result."[5]

2. The court below further committed plain error when it held that even if there had not been compliance with Section 19(b), it nevertheless has inherent power to consider and correct *sua sponte* errors lurking in the record made before the Commission. In so holding, the court failed to distinguish between its functions *vis a vis* the district courts and its functions *vis a vis* administrative agencies. Although the courts of appeals have such inherent power in reviewing judgments of district courts, their jurisdiction over administrative action is far narrower, and is defined by the statutory provisions authorizing review. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300-301; *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U.S. 385, 388-389; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155. And Section

---

[5] Colorado's suggestion, that the fact that the validity of the condition was questioned by the Commission staff counsel in the merger proceeding constitutes reasonable excuse for its failure to urge invalidity in the rate proceeding (R. 643, 645), plainly has no substance. It was not Colorado which attacked the condition in the merger proceeding; on the contrary, Colorado there vigorously defended the condition which it itself had proposed. Consequently, the situation presented here is far stronger for preclusion from judicial consideration than if mere failure to raise or even acquiescence were involved. It is established that acquiescence before the administrative agency is sufficient to bar court review without reference to whether the statutory review provision requires raising the issue before the agency. *See United States* v. *Hancock Truck Lines*, 324 U.S. 774, 779-780.

19(b), which vests in the courts of appeals whatever authority they might have to review orders of the Commission, on its face does not permit *sua sponte* consideration of lurking errors. By unambiguously providing that "No objection * * * shall be considered *by the court* * * *" (italics supplied), Section 19(b) patently is not addressed solely at preventing the complaining party from raising new questions, but rather precludes *sua sponte* consideration of such an alleged error by the court as well. Cf. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649.

Moreover, well established principles require that Section 19(b) be read in accordance with its plain language. For example, in *National Labor Relations Board* v. *Cheney Lumber Co.*, 327 U.S. 385, where a court of appeals had struck out a paragraph of a Labor Board order not objected to by the company in the administrative proceeding, this Court reversed, pointing out that the provision in the National Labor Relations Act, comparable to Section 19(b) (see *supra*, p. 9 and fn. 4), constituted "[a] limitation which Congress has placed upon the power of courts to review orders of the Labor Board" (327 U.S. at 388). By this provision "Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested * * * [the provision] 'gives emphasis to the salutary policy * * * of

affording the Board opportunity to consider on the merits questions to be urged upon review of its order' " (*id.* at 389). See, also, *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649; *United States* v. *Hancock Truck Lines*, 324 U.S. 774, 779-780; *May Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 386, fn. 5; *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36-37; cf. *United States ex rel Vajtauer* v. *Commissioner*, 273 U.S. 103, 113; *United States* v. *Northern Pacific R. Co.* 288 U.S. 490, 494. "[O]rderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts." *United States* v. *Tucker Truck Lines*, *supra*, at 37.[6] Not only the results but the reasoning of these cases foreclose the distinction adopted by the court below that while the complaining party could not raise the issue, the court *sua sponte* could consider it.

Furthermore, contrary to the holding of the court below (R. 632), the salutary rule embodied in Section 19(b) has been applied by this Court

[6] As stated in *Unemployment Commission* v. *Aragon*, 329 U.S. 143, 155:

> A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action.

to questions of law as well as issues of fact. Thus even if the "end result" principle be assumed to raise a pure question of law, Section 19(b) nevertheless governs. In the *Marshall Field* case, the question which this Court held could not be considered because not raised before the National Labor Relations Board, related to the Board's power to grant a back pay order which was construed as barring the deduction of unemployment compensation from the award. In the *Panhandle Eastern Pipe Line* case the problem was whether the exemption of Section 1(b) of the Natural Gas Act deprived the Commission of authority to include production and gathering facilities at original cost in the rate base for jurisdictional sales. In the *Tucker Truck Lines* case, the issue concerned the validity of a hearing subject to the Administrative Procedure Act, had before an examiner not appointed pursuant to Section 11 of that Act (5 U.S.C. 1010). See, also, *Todd* v. *Securities and Exchange Commission*, 137 F. 2d 475, 478 (C.A. 6). The issue in each of these cases clearly was not factual in nature, yet the failure to raise it before the administrative agency was held to preclude judicial consideration.[7] Cf. *Macauley* v. *Waterman Steamship Corp.*, 327 U.S. 540, 544;

---

[7] Colorado's contention that the rule is inapplicable since the court below "by granting rehearing has afforded" the Commission an "opportunity to present its side of the case on this question" (R. 645), does not bear analysis. Similar "opportunities" in the reviewing court would have been afforded the administrative agency in each of the cases referred to in the text; nevertheless in each case this Court held that the courts were barred from considering the alleged error.

Aircraft & Diesel Corp. v. *Hirsch*, 331 U.S. 752; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802.

3. The further holding below that Section 10(e) of the Administrative Procedure Act, *supra*, p. 4, sanctioned such *sua sponte* consideration of issues not raised before the administrative agency, is contrary to the plain language of that Act. Thus, the introductory clause of Section 10 explicitly makes the succeeding subsections inapplicable where "(1) statutes preclude judicial review * * *." This clause, when read with Section 19(b) of the Gas Act, plainly precludes the result reached below. This conclusion is buttressed by the fact that the purpose of the introductory clause was to dovetail the general provisions of the Administrative Procedure Act with the statutory review provisions applicable to particular agencies. See, *e.g.*, S. Doc. No. 248, 79th Cong. 2d Sess. p. 36. Furthermore, while Section 10(e) of the Administrative Procedure Act provides that reviewing courts are to decide "all relevant questions of law * * *," this provision is operative only "where [such questions of law are] presented."

Moreover, this Court has already held that the Administrative Procedure Act does not abrogate the well established principles already discussed. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, was decided several years after the enactment of the Administrative Procedure Act; indeed, it concerned the failure of the Interstate Commerce Commission to comply in its administra[illegible] pro-

ceeding with a requirement of Administrative Procedure Act previously held by this Court to be "jurisdictional." *Riss & Co. v. United States*, 341 U.S. 907; *Wong Yang Sung v. McGrath*, 339 U.S. 33. In there holding that failure to raise the issue before Commission precluded judicial consideration of the alleged error, this Court affirmed the continued vitality of the statutory provisions and judicial decisions relating to the necessity of raising issues before administrative agencies before they may be considered by the reviewing courts. 341 U.S. at 36-37; see, also, *National Labor Relations Board v. Townsend*, 185 F. 2d 378, 380-381 (C.A. 9), certiorari denied, 341 U.S. 909; *National Labor Relations Board v. Pinkerton's National Detective Agency*, 202 F. 2d 230, 233 (C.A. 9); *National Labor Relations Board v. Pugh & Barr, Inc.*, 194 F. 2d 217, 220 (C.A. 4); *Democrat Printing Co. v. Federal Communications Commission*, 202 F. 2d 298, 303-304 (C.A. D.C.).

4. Finally, it should be noted that, as already indicated, the provision as to the exclusion of excess costs was incorporated in a condition imposed by the Commission in approving Colorado's application for authority to merge with Canadian River Gas Company in another proceeding. The condition was suggested by Colorado to eliminate an objection to the proposed merger and was an important element relied on by the Commission in reaching its conclusion that the merger would be in the public interest. Colorado itself would have been estopped from challenging the condition in

which it had more than acquiesced. *United States* v. *Hancock Truck Lines*, 324 U. S. 771, 779, 780. The effect of the court's ruling here is not only to strike down the condition in a collateral proceeding but to leave the merger outstanding without the condition. Since the determination whether the merger would be consistent with the public interest without the condition is one to be made by the Commission, the court's action infringes upon the administrative function, in violation of the long-settled principle most recently reiterated in *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17.*

---

* The exclusion of the loss from cost of service represented an appropriate "balancing of the investor and the consumer interests" by the Commission (*Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 603) and did not impair the financial integrity or credit of Colorado. During the pendency of the rate proceedings, there was a public offering of Colorado's common stock with full disclosure to prospective investors that the loss under the merger condition would not be "considered as a cost of service to Colorado's natural-gas consumers," but would be borne by the investors. (Tr. 2685, 2694). Notwithstanding this, the common stock was promptly over-subscribed. As the court of appeals noted in sustaining the Commission's finding that 5¾% is a fair rate of return (R. 608):

> The fact that this offering was promptly oversubscribed is evidence of the standing of Colorado with the investing public and, if we must as urged by Colorado take into account that the eagerness to purchase this stock was motivated in the belief of the future development of Colorado's resources, we must on the other hand not be unmindful that that manifested interest was in the face of a rate hearing which might well, as it did, result in a decrease of rates.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. Moreover, since the decision below is so clearly contrary to the consistent rulings of this Court on the point in question, the Court might appropriately consider reversing the judgment of the court below without further briefs or argument.

SIMON E. SOBELOFF,
Solicitor General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

APRIL, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954